

HUMAN SERVICES BOARD

INTRODUCTION

DISCUSSION

The parties agree that the petitioner lives with his mother, who is his legal guardian and who, at present, is

primarily responsible for providing him with care and supervision on a full-time basis.

The Department (in a letter dated October 11, 1999) denied the petitioner's application for attendant care services because of its conclusion that the petitioner has "a mental disability" and needs "cueing and supervision", and that the Attendant Care Services Program is "limited to adults who need physical assistance with activities of daily living".

The Attendant Services Program is comprised of three types of care or services: group-directed attendant care, personal services, and participant-directed attendant care. 33 V.S.A. § 6321(a) (see infra). The parties agree that at present there is no group-directed attendant care program operating in Vermont and that, even if there were, the petitioner would not be eligible for such a program. The petitioner alleges that he should be found eligible under either the participant-directed attendant care (PDAC) component of the program or under personal services.

33 V.S.A. § 6321(a) includes the following in the definition of Attendant care services:

As used in this section,

(1) "Attendant care services" means one of more of the following types of care or service provided for compensation: assistance with personal care including

dressings, bathing, shaving and grooming, and assistance with eating, meal preparation and ambulation. Recipients of attendant care services shall have the opportunity to hire, train and terminate the employment of attendants as necessary, establish work schedules, manage the services and oversee payments of attendants and recordkeeping.

(2) (Group-directed attendant care) . . .

(3) "Personal services" mean attendant care services provided to an elderly or disabled Medicaid eligible individual in his or her home, which are necessary to avoid institutionalization.

(4) "Participant-directed attendant care" means attendant care services for a permanently, severely disabled individual who requires services in at least two activities of daily living in order to live independently.

It is concluded at the outset that the petitioner in this case does not meet subparagraph (4) of the above definitions (PDAC) because there is no claim or indication that the services he seeks will have any impact whatsoever on his ability to live independently. The petitioner has a severe mental disability that precludes his living on his own under any circumstances, with or without attendant care services. From all indications, whatever help he were to receive in the areas listed in paragraph (1), above, he would still require 24-hour supervision. There is no indication in the statute or in the Department's regulations and policy that the PDAC program is designed to provide relief or respite for the providers of full-time care to totally dependent disabled

persons. Its intent is to provide the amount of personal services necessary for the individual receiving them to be able to live on his or her own, without supervision--i.e. "independently".

The petitioner's eligibility under subparagraph (3) of the statute, i.e., "personal services", is a closer question. The Department concedes that in practice it does not require that the provision of such services be a *sine qua non* of avoiding institutionalization. It does maintain, however, that all attendant care services, PDAC as well as personal services, require the presence of a physical inability to perform the task of personal care for which assistance is being sought. The petitioner does not dispute that he has the physical capability to perform, albeit with varying degrees of supervision and guidance, all activities of daily living. He concedes that the type of personal care he is seeking entails verbal "cueing" and supervision rather than "hands-on" physical assistance. The issue in this case is whether the Department's policy of requiring the need for physical assistance is consistent with the statute and regulations defining attendant care services.

The above statute, as well as the Department's regulations (Section 103), define attendant care services as

"assistance with personal care". The word "assistance" is not defined further in either the statute or the regulations.

There is no dispute that since the inception of the attendant services program the Department has consistently interpreted the above definition as meaning hands-on physical assistance with personal care. However, neither party is able to point to any written policy or guideline either supporting or contradicting this interpretation.

33 V.S.A. § 6321 (d) provides:

The commissioner shall adopt rules to implement the provisions of this section including eligibility criteria for the programs, criteria for determining service needs, rules relating to control and oversight of services by beneficiaries of a program and procedures for handling and maintaining confidential information. Prior to filing a proposed rule, the commissioner shall seek input from individuals with disabilities, the elderly and organizations which represent such individuals.

According to the Department its rules and policies governing the attendant care services program have been in place since 1990; and it maintains that except for a very few individuals who were "grandfathered" into this program at its inception it has never granted attendant care services for cueing, supervision, or any other non-physical assistance. The issue, then, is whether this long-standing, but unwritten, policy is consistent with the statutory definition of "assistance with personal care".

It is well-settled law that "the interpretation of a statute by the administrative body responsible for its execution will be sustained on appeal absent compelling indication of error". Mountain Cable Co. v. Department of Taxes, 168 Vt. 454, 458 (1998). In this case it cannot be concluded that the Department's interpretation of the statute is plainly erroneous or contrary to legislative intent. To the contrary it is clear that the legislature intended to vest considerable discretion in the Department to define eligibility and criteria for service needs. The petitioner has not shown that the words "assistance with personal care" were so clearly intended to include cueing and supervision that the Board is required by law to reverse the Department's decision. See 3 V.S.A. § 3091(d) and Fair Hearing Rule No. 17.

ORDER

The Decision of the Department of Aging and Disabilities denying the petitioner's application for the Attendant Services Program is affirmed.

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